UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MOHAMAD B. NADER	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION NO.
	:	3:98 CV 2085 (CFD)
THE BRUNALLI CONSTRUCTION CO.	:	
Defendant.	:	

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. Introduction

In this action, plaintiff Mohamad B. Nader ("Nader") alleges pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"), and the Connecticut Fair Employment Practices Act, Conn. Gen. Stat. § 46a-60(a)(1) ("CFEPA"), that his former employer, The Brunalli Construction Company ("the company") discriminated against him because he is of Arabic descent. He also alleges that the defendant's agents and employees intentionally inflicted emotional distress upon him throughout the course of his employment with the company. The relief requested by the plaintiff includes back pay, compensatory damages, punitive damages, and costs and reasonable attorney's fees.

Pending is the company's motion for summary judgment [Doc. # 24]. For the following reasons, it is granted in part and denied in part.

II. Background

The defendant has submitted a Local Rule 9(c)(1) statement of material facts not in dispute, and the plaintiff has responded to these facts in his Local Rule 9(c)(2) statement by indicating whether each statement is admitted or denied. However, as part of his Local Rule

9(c)(2) statement, the plaintiff included his own "Statement of Material Facts to Which There is No Genuine Issue[] to be Tried," rather than a section listing each issue of material fact as to which he contends there is a genuine issue to be tried, as required by Local Rule 9(c)(2). Given that the defendant has responded to the plaintiff's statements by indicating whether each is admitted or denied, the Court will consider the undisputed facts contained therein.[1]

The following statements are undisputed unless otherwise indicated.

A. Parties to this action, other company employees, and company policies

Nader, an American citizen of Arab descent, was hired by the company on May 15, 1989 and was employed as a project field engineer. The decision to hire the plaintiff was made by Brunalli, the president and treasurer of the company, which is a heavy highway contractor whose primary emphasis is on bridge structures.

The company had an affirmative action program in place at all times relevant to the complaint. Brunalli was responsible for enforcing the program, though the defendant maintains that Brunalli shared this responsibility with the acting Equal Employment Opportunity Officer ("EEO Officer"). Franklin Crowley ("Crowley") held this position beginning in 1993, though it is unclear who had previously occupied it. Although the defendant maintains that it had no minority hiring quota, Nader contends that he was hired because the defendant considered him to be a minority.[2]

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[1]It is further noted that the defendant has admitted some statements for the purposes of this motion only. In particular, John A. Brunalli ("Brunalli") in his deposition denied several of the statements which the defendant has admitted in its response to the plaintiff's Local Rule 9(c) Statement.

[2]On one occasion, Mary Baker ("Baker"), a fellow engineer and employee, apparently introduced Nader to a co-worker as a minority hire. See Pl.'s Ex. 3, Nader Dep. at 68.

At all relevant times, the defendant also had a complaint procedure for the purposes of handling employee discrimination or harassment complaints and, as stated above, the company had an EEO Officer. Certain complaints about problems in the workplace could be brought to the attention of supervisors, though the parties dispute whether discrimination or harassment complaints could be brought to Brunalli. Still, the plaintiff understood that Brunalli was the ultimate arbiter of disputes within the company.

Throughout the plaintiff's employment with the company, Helen Henkel ("Henkel") was employed by the defendant in a secretarial and clerical position. Henkel did not report to Nader, but if Nader asked her to perform a task, she was obligated to do it. From 1989 to approximately December 1991, Henkel and Nader were assigned to the company's field office, which was located in a trailer near one of its job sites.

From 1989 to 1993, Dennis Miller ("Miller") was the plaintiff's supervisor. At the time the plaintiff left the company, Thomas Larson ("Larson") was his supervisor.

B. Alleged incidents of harassment and discrimination

The plaintiff bases his claims in this action on the following alleged incidents, which are taken from the Complaint, the parties' Local Rule 9(c)(2) statements, his deposition testimony, see Pl.'s Ex. 3, and his interrogatory responses, see Def.'s Ex. G.[3] The plaintiff's claims are listed as allegations unless the defendant has admitted that they are undisputed or has indicated that they are disputed. To the extent that the allegations are found in the plaintiff's deposition and interrogatory responses, the facts must be taken in the light most favorable to him in resolving this

[3]Nader claims in his response to Interrogatory # 9, see Def.'s Ex. G, that certain of the incidents were witnessed by other employees, but he has not provided any deposition testimony from those employees.

motion, and the Court assumes that employees and supervisors made the remarks attributed to them, as it must for the purpose of deciding the motion for summary judgment.

In August 1989, Henkel called the plaintiff a "Scum Arab" and told the plaintiff to "go back where [he] came from."[4] The plaintiff alleges that she used other profanity as well. Nader reported this incident to Miller in August 1989, to Brunalli in September 1989, and to Sam Falzarano ("Falzarano"), the company's chief engineer from 1989 to 1991, in October 1989.

On various occasions in 1990, Henkel again called Nader a "Scum Arab," and told the plaintiff to "Go back where you came from." The plaintiff also alleges that she used other profanity. He apparently did not report these incidents.

In February 1990, the plaintiff claims that Ray Presley ("Presley"), a project manager, told him "We should never hire foreign engineers," and "You will never be an American." He apparently did not report these incidents.

In June 1990, the plaintiff claims that Presley told him, "All Blacks should be put on a ship which would take them to the Atlantic Ocean and then be thrown overboard telling them to swim back to where they came from." He did not report this incident either.

The plaintiff claims that in November 1990, he was locked out of his office during cold weather by Henkel. Pl.'s Ex. 3, Henkel Depo. at 45. He allegedly reported the incident to Miller.

In December 1990, after the plaintiff commented on the cold weather, the plaintiff alleges that Henkel told him "Well, go back where you came from." He apparently did not report this incident.

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[4]The Court notes that in the plaintiff's response to Interrogatory # 9, the plaintiff does not state that Henkel told him to "go back to where [he] came from," but the defendant admits that she did so in its response to the plaintiff's Rule 9(c)(2) statement.

The defendant claims that at various times from May 15, 1989 to December 1991, when the plaintiff was assigned to one of the company's field offices, the plaintiff found trash, including bathroom tissue, leftover food, paper, and empty beverage cans placed on his engineering drawing desk. Nader suspected that Henkel had placed it there. Id. at 45. He allegedly reported one of the incidents to Falzarano and one of the incidents to Crowley. In December 1989, Falzarano, Crowley, Henkel, and the plaintiff had a meeting regarding the incident. See id. Nader Dep. at 54-58. The plaintiff claims to have followed up this meeting with Falzarano. Id. at 56-58.

The plaintiff claims that in December 1991, Presley told him "Fuck all foreign engineers." He apparently did not report this incident. Nader also claims stated that Presley stated that Nader would never be an American. Id. at 45.

On at least several occasions from 1989 to 1997, Brunalli asked the plaintiff, "How come the Arabs are not minorities?"

At least once between 1989 to 1997, Brunalli asked the plaintiff, "How come all Arabs are bald-headed?".

The plaintiff claims that on many occasions during his employment, Presley asked the plaintiff to "describe your camel, does it have two humps or one." He apparently did not report these incidents.

Sometime during 1993, Henkel allegedly blocked the plaintiff's field radio communications with other employees. The plaintiff claims that he complained to Miller several times in 1993, but it is not clear whether those complaints related to this incidents or others.

In July 1993, the defendant furnished the plaintiff with a used red pickup truck as a means of transportation. Nader maintains that this act was discriminatory because other engineers were

furnished with white four-door sedans. The parties dispute whether the plaintiff made any complaints about this issue, though Miller stated in his deposition that Nader had complained to him that he would like to have a company car and thought that he deserved one. See Def.'s Ex. F, Miller Dep. at 26. They agree, however, that there was no formal obligation to supply employees with a vehicle, that other employees waited for company-furnished transportation, and that non-Arabic employees drove red trucks. It also is undisputed that approximately six to eight months after he was given the truck, the defendant furnished Nader with a four-door sedan.

The plaintiff claims that in March 1995, Miller told Baker, referring to the plaintiff, "Well he is from the Middle East. He is a prime suspect." Nader apparently did not report this incident.

In October 1995, the plaintiff claims that Henkel was not typing the letters "PE," which is an acronym for the plaintiff's job title (i.e., "Professional Engineer"), next to his name on correspondence. He allegedly complained to Crowley about this incident. It is not clear whether he reported the incident to Brunalli.

The plaintiff also alleges that he was paid less than other similarly situated employees because of his national origin. He bases this allegation on the fact that he allegedly discovered the salary of Baker, whom he considered to be of equal seniority, though he has not provided any evidence to support this allegation. On several occasions, the plaintiff complained to Brunalli about this issue.

In March 1996, the plaintiff complained to the defendant that Henkel was not typing the letters "PE" next to his name on correspondence. He allegedly complained to Crowley about this incident, but again it is not clear whether he reported the incident to Brunalli.

The plaintiff claims that in April 1996, a Brunalli crane operator identified as John called

him a "Refugee."

The plaintiff claims that on several occasions, including May 1996, employee Bob Armstrong ("Armstrong") asked him "They didn't ship you out of the Country yet?"

The plaintiff maintains that in August 1996 he again complained that Henkel failed to type "PE" on his correspondence.

On August 15, 1996, Henkel told him "Go back where you came from you scum Arab." He allegedly complained about this to Brunalli on the same day, but it is not clear whether his complaint related solely to this incident, or to her failure to type "PE" on his correspondence. That same day, the plaintiff claims that Brunalli called him a "smart ass" in front of all the office employees.

On September 17, 1997, Henkel again told him "Go back where you came from."

C. The company's response

In August 1989, Nader informed Miller that Henkel had called him a "Scum Arab" and told the plaintiff to "go back from where [he] came from." He also complained to Miller on several other occasions of difficulties with Henkel. The defendant claims that Miller met with Ms. Henkel, and instructed her to "get along" with the plaintiff and set aside any personality conflicts with him.

In September 1989, the plaintiff complained to Brunalli about the same incident. In response to the plaintiff's complaint, Brunalli met with the plaintiff and Henkel and instructed both individuals to act in a professional manner. The plaintiff claims that Brunalli told him to ignore the situation, a charge with the defendant disputes, and that he "didn't want to hear it anymore," a charge with the defendant admits, but maintains it was not intended to imply that the

plaintiff was not to report other instances of harassment.

In December 1989, after the plaintiff complained about one of the trash incidents to Crowley, he states in his deposition that he met with Crowley, Falzarano, Henkel about it. He claims that no agreement was reached as a result of the meeting. See Pl.'s Ex. 3, Nader Dep. at 56. He also claims that he discussed the incident again with Falzarano a few weeks later. Id. at 57.

In December 1993, after complaining to Miller about Henkel's locking him out of his office, Nader claims that nothing was done. Id. at 60.

In 1995, after the plaintiff complained to Brunalli about his allegedly inadequate and discriminatory level of pay, he later received a raise.

In response to the plaintiff's March 1996 complaint that Henkel was not typing the letters "PE" next to his name on correspondence, Brunalli apparently met with Henkel, instructed her to include the letters "PE" on the plaintiff's correspondence and to give the plaintiff the professional respect he deserved, and threatened to reprimand her if she did not follow those instructions. Henkel agreed to do so. The plaintiff maintains that he was not present at this meeting, though Crowley indicated in his deposition that Nader was in attendance. See Def.'s Ex. D., Crowley Dep. at 19.

D. Nader's final day of work

On September 18, 1997, Nader arrived at work at 7:25 a.m. Brunalli and Larson had a discussion during which Brunalli instructed Larson to assign work to the plaintiff after Larson claimed to be too busy to do the work. The plaintiff interjected himself into the discussion, though the parties dispute whether Nader refused to do the assignment. Nader admitted in his

deposition, however, that he told them, "I am busy too." Id. at 77. Brunalli and the plaintiff then had a brief exchange of words during the course of which Brunalli's voice became elevated and he yelled at Nader. According to Nader, "He started screaming and yelling, kicking desks, telephones, biting his fingers, getting his face so close to my face within one inch I would say and all his saliva coming on my face." Id. at 78. At no time during this exchange did Brunalli make any comments, derogatory or otherwise, about the plaintiff's national origin. At no time during this exchange did Brunalli reduce Nader's pay, nor discipline, demote, or suspend him.

Shortly thereafter, Nader left the defendant's premises and went to Bradley Hospital in Southington, Connecticut, and was subsequently treated by several doctors for stress-related symptoms.

September 18, 1997 was the plaintiff's final day of work, though the parties dispute whether he voluntarily resigned from his position. The company did not hire anyone specifically to replace Nader.

E. History of this action

On February 11, 1998, the plaintiff filed a charge of discrimination with the Connecticut Commission on Human Rights and Opportunities ("CHRO") and the Equal Employment Opportunity Commission ("EEOC"). See Def.'s Ex. H. The CHRO dismissed the plaintiff's charge on May 12, 1998, and the plaintiff filed a timely request for reconsideration. The CHRO denied the plaintiff's request for reconsideration on September 17, 1998 and it was not appealed. See Def.'s Ex. I. The plaintiff has not obtained a release from the CHRO. However, on August 7, 1998, the EEOC issued a Notice of Suit of Rights, or right to sue letter, authorizing the plaintiff to commence a civil action in state or federal court for violations of Title VII.

Count One of the Complaint alleges discrimination under Title VII, and appears to be premised on hostile work environment and constructive discharge theories. Counts Two and Three allege intentional infliction of emotional distress.[5] Count Four alleges discrimination under CFEPA.

III. Standard

In a motion for summary judgment, the burden is on the moving party to establish that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law. See Fed. R. Civ. P. Rule 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). A court must grant summary judgment "'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact . . . .'" Miner v. Glen Falls, 999 F.2d 655, 661 (2d Cir. 1993) (citation omitted). A dispute regarding a material fact is genuine "'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 523 (2d Cir.) (quoting Anderson, 477 U.S. at 248), cert. denied, 506 U.S. 965 (1992). After discovery, if the nonmoving party "has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof," then summary judgment is appropriate. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

The Court resolves "all ambiguities and draw[s] all inferences in favor of the nonmoving party in order to determine how a reasonable jury would decide." Aldrich, 963 F.2d at 523.

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[5]The Complaint is unclear as to these claims. Count Two is entitled "Intentional Infliction of Emotional Distress," Count Three is entitled "Intentional or Reckless Infliction of Emotional Distress," and the allegations therein are identical. The Court will consider Counts Two and Three as both alleging intentional infliction of emotional distress under Connecticut law.

Thus, "[o]nly when reasonable minds could not differ as to the import of the evidence is summary judgment proper." Bryant v. Maffucci, 923 F.2d 979, 982 (2d Cir.), cert. denied, 502 U.S. 849 (1991). See also Suburban Propane v. Proctor Gas, Inc., 953 F.2d 780, 788 (2d Cir. 1992). Additionally "[w]here, as here, the non- movant bears the burden of proof at trial, the movant can satisfy its burden of production by pointing out an absence of evidence to support an essential element of the non-movant's case." Gibsberg v. Healey Car & Truck Leasing, Inc., 189 F.3d 268, 270 (2d Cir. 1999) (citing Celotex, 477 U.S. at 323-24 and Tops Mkts.,Inc. v. Quality Mkts., Inc., 142 F.3d 90, 95 (2d Cir. 1998)).

The Court exercises caution in granting summary judgment in favor of an employer in employment discrimination cases "when, as here, the employer's intent is at issue." Kerzer v. Kingly Mfg., 156 F.3d 396, 400 (2d Cir. 1998) (citing Gallo v. Prudential Residential Servs., Ltd. P'ship, 22 F.3d 1219, 1224 (2d Cir. 1994)). However, in order to defeat a defendant employer's motion for summary judgment, a plaintiff employee must offer "concrete evidence from which a reasonable juror could return a verdict in his favor" and may demand a trial simply because the central issue is the defendant employer's state of mind. Dister v. Continental Group, Inc., 859 F.2d 1108, 1114 (2d Cir. 1988) (internal quotations omitted).

IV. Discussion

A. Count One: Title VII

In its motion for summary judgment, the company makes three principal arguments with respect to Nader's Title VII claim: (1) most of the incidents of alleged discrimination and harassment are untimely and cannot be considered by the Court, (2) with respect to the plaintiff's hostile work environment claim, the evidence does not show that the workplace was sufficiently

permeated with severe and pervasive intimidation, insults, and ridicule, and (3) with respect to the plaintiff's constructive discharge claim, the plaintiff has not put forward sufficient evidence to establish a prima facie case. Each will be discussed below.

1. Untimeliness

When alleged discrimination occurs in a state or locality that has its own antidiscrimination laws and an enforcement agency, a plaintiff must file a discrimination claim within 300 days of the occurrence of the allegedly unlawful employment practice. 42 U.S.C. § 2000e-5(e)(1); 29 U.S.C. § 626(d)(2), 633(b); Ford v. Bernard Fineson Dev. Ctr., 81 F.3d 304, 307 (2d Cir. 1996). Here, the plaintiff filed his charge of discrimination with the CHRO and EEOC on February 11, 1998. As a result, incidents that occurred more than 300 days before that date, or before April 17, 1997 in this case, generally are time-barred. See Quinn v. Green Tree Credit Corp., 159 F.3d 759, 765 (2d Cir. 1998).

However, continuing violations are excepted from this rule, and Nader argues that this exception applies in his case. "The continuing violation exception extends the limitations period for all claims of discriminatory acts committed *under an ongoing policy of discrimination* even if those acts, standing alone, would have been barred by the statute of limitations." Id. (emphasis in original; internal quotation and citation omitted); see also Weeks v. New York State, 273 F.3d 76, 82 (2d Cir. 2001). To allege a continuing violation, "the claimant must allege both the existence of an ongoing policy of discrimination and some non-time-barred acts taken in furtherance of that policy." Harris v. City of New York, 186 F.3d 243, 250 (2d Cir.1999). The continuing violations exception is applicable in two situations. First, it applies where there is evidence that the employer utilized specific discriminatory practices such as seniority lists or

employment tests. Lightfoot v. Union Carbide Corp., 110 F.3d 898, 907 (2d Cir. 1997); Lambert v. Genesee Hospital, 10 F.3d 46, 53 (2d Cir.1993). Second,

> [a]lthough the continuing violation exception is usually associated with a discriminatory policy, rather than with individual instances of discrimination, and although acts so "isolated in time . . . from each other . . . [or] from the timely allegations[ ] as to break the asserted continuum of discrimination" will not suffice, Quinn v. Green Tree Credit Corp., 159 F.3d at 766, a continuing violation may be found "where specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as to amount to a discriminatory policy or practice." Cornwell v. Robinson, 23 F.3d 694, 704 (2d Cir.1994).

Fitzgerald v. Henderson, 251 F.3d 345, 359 (2d Cir. 2001), petition for cert. filed, 70 U.S.L.W. 3163 (U.S. Aug. 29, 2001) (No. 01-373); see also Green v. Los Angeles County Superintendent of Sch., 883 F.2d 1472, 1480-81 (9th Cir.1989) ("A continuing violation may . . . be established not only by demonstrating a company[-]wide policy or practice, but also by demonstrating a series of related acts against a single individual. . . . In the latter instance, the question . . . boils down to whether sufficient evidence supports a determination that the alleged discriminatory acts are related closely enough to constitute a continuing violation." (internal quotations and citations omitted)).

The timing of the alleged acts of discrimination and harassment is an important consideration in determining whether the continuing violation exception applies. "Absent unusual circumstances, a two-year gap is a discontinuity that defeats use of the continuing violation exception." Weeks, 273 F.3d at 84. In Quinn, the Court held that acts occurring in breaks of 3 years, 1 year, and less than a year were sufficiently isolated in time to break the continuum of discrimination. See 159 F.3d at 766. Additionally, acts that are "completed" or "discrete," such as termination, discontinuance of a particular assignment, or job transfers, see Lightfoot, 110 F.3d

at 907, or repeated failures to promote, see Meckenberg v. New York City Off-Track Betting, 42 F. Supp. 2d 359, 371-72 (S.D.N.Y.1999), are not considered to be acts of a continuing nature. See also Pauling v. Secretary of Dept. of Interior, 960 F. Supp. 793, 801-02 (S.D.N.Y.1997).

As an initial matter, a plaintiff may not rely on the continuing violations exception unless he has asserted the theory in prior administrative proceedings. Fitzgerald, 251 F.3d at 359. In his CHRO complaint, Nader states that "On September 18, 1997 and for long time prior thereto I was harassed and discriminated against in the terms and conditions or employment with Brunalli Construction Company." Def.'s Ex. H. While this statement does not clearly indicate his reliance on a continuing violations theory, it appears that his reference to the fact that the harassment and discrimination occurred "for a long time prior" to September 18, 1997 is sufficient to invoke the continuing violations exception here. Cf. Fitzgerald, 251 F.3d at 363 (determining that the plaintiff had sufficiently raised the issue where letters from the state agency indicated that the violations alleged began on a date that would otherwise have been time-barred, though in that case the agency also specifically stated that she was seeking to rely on a continuing violations theory).

As to the plaintiff's claims, there appear to be three periods of discrimination or harassment, with several isolated incidents occurring throughout the time that Nader was employed by the company. First, the plaintiff alleges that he was subjected to various forms of harassment from August 1989 to December 1991, the period of time when he was assigned to work in the company's trailer located in its field office. Several incidents that allegedly occurred during this period are recounted in the plaintiff's deposition and not disputed by any evidence introduced by the defendant, and thus must be taken as true. These include Presley's comments

about foreigners (February 1990 and December 1991) and Presley's comment about African-Americans (June 1990). Two instances of alleged discrimination appear to be somewhat disputed, Henkel's locking Nader out of the office (November 1990), and the trash incidents (various times from 1989 to 1991), as Henkel stated in her deposition that she always treated Nader "with respect."

Next, there were several scattered incidents of harassment occurring from July 1993 to October 1995. These included the controversy over Nader's company vehicle (in July 1993), Henkel's attempts at blocking Nader's radio communications (sometime in 1993), Miller's comment about Nader being a prime suspect (March 1995), Henkel's first refusal to type "PE" after his name (October 1995), and Nader's complaints about his allegedly insufficient rate of pay (sometime in 1995). Some of these incidents are disputed. For instance, it is not clear whether the defendant's furnishing a red pickup truck rather than a white sedan was discriminatory in nature, or whether the allegedly difference in pay between Nader and "similarly situated" employees was the result of discrimination.

No other incidents of discrimination or harassment occurred until March 1996, when a second series of occurrences appears to have begun: Henkel refused to type "PE" on his correspondence (March 1996), the crane operator called him a "Refugee" (April 1996), Armstrong asked him, "They didn't ship you out of the Country yet?"(May 1996), Henkel again refused to type "PE" on his letters (August 1996), Henkel told him to go back where he came from (August 1996), and Brunalli called him a "smart ass" in front of other employees (August 1996). These incidents, recounted in the plaintiff's deposition, do not appear to be disputed by any evidence introduced by the defendant.

Another incident of alleged discrimination or harassment did not occur for 13 months, until September 1997, when a third period of incidents occurred: Henkel again told him to "Go back where you came from" and Brunalli became angry at his perceived unwillingness to accept an assignment, leading to Nader's resignation. These appear to be undisputed, and it also is noted that they fall within the relevant 300-day period, and thus are not time-barred.

In addition to these three "phases" and other incidents described above, it is undisputed Nader was harassed in other ways, but the parties dispute how often this harassment occurred. For example, on several occasions, Brunalli asked the plaintiff, "How come the Arabs are not minorities?", but it is not clear how many times Brunalli asked this question or when he did so. In addition, the parties agree that Brunalli asked, "How come all Arabs are bald-headed?" at least once, but the plaintiff maintains that he did so on many occasions, though again he does not indicate the dates of these incidents. Finally, the defendant has not introduced any evidence to dispute the plaintiff's allegations that on many occasions Presley asked the plaintiff to "describe your camel, does it have two humps or one."

While acts so "'isolated in time . . . from each other . . . [or] from the timely allegations[ ] as to break the asserted continuum of discrimination' will not suffice," Fitzgerald, F.3d at 359 (quoting Quinn, 159 F.3d at 766), in this case certain portions of the asserted continuum of discrimination remain genuine issues of material fact. The Court also has considered whether, if all of the plaintiff's allegations are accepted as true, the continuing violations exception could apply. While many of the allegations are separated by periods of time in which no alleged discrimination occurred, the Court cannot determine the relatedness of the incidents until the disputed facts are resolved. In other words, "[w]hile a jury well might resolve the question in [the

defendant's] favor, the Court is unwilling at this stage to conclude that no reasonable trier could find the elements of the continuing violations doctrine satisfied with respect to plaintiff's hostile work environment claim." Alonzo v. Chase Manhattan Bank, N.A., 70 F. Supp. 2d 395, 397 (S.D.N.Y. 1999).

2. Hostile work environment

Given that there are genuine issues of material fact as to the incidents in question, the Court cannot now conclude that the defendants are entitled to summary judgment on the plaintiff's hostile work environment claim. To prevail on a hostile work environment claim, a plaintiff must show: (1) a hostile work environment, or in other words, that his workplace was permeated with discriminatory intimidation that was sufficiently severe or pervasive to alter the conditions of his work environment; and (2) a specific basis for imputing the conduct that created the hostile environment to the employer. Van Zant v. KLM Royal Dutch Airlines, 80 F.3d 708, 715 (2d Cir. 1995). An employer on notice of the existence of a hostile work environment has a duty to take reasonable steps to eliminate it. Snell v. Suffolk County, 782 F.2d 1094, 1104 (2d Cir.1986).

As to the first prong of this test, "[t]he conduct alleged must be severe and pervasive enough to create an environment that would reasonably be perceived, and is perceived, as hostile or abusive." Schwapp v. Town of Avon, 118 F.3d 106, 110 (2d Cir. 1997) (internal quotation omitted). This determination depends on the totality of the circumstances. Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).

> As the Supreme Court has stated, "'mere utterance of an . . . epithet which engenders offensive feelings in an employee' does not sufficiently affect the conditions of employment to implicate Title VII." Id. at 21 (quoting Meritor, 477

> U.S. at 67) (citation omitted; alteration in Harris). For racist comments, slurs, and jokes to constitute a hostile work environment, there must be "more than a few isolated incidents of racial enmity," Snell v. Suffolk County, 782 F.2d 1094, 1103 (2d Cir.1986), meaning that "[i]nstead of sporadic racial slurs, there must be a steady barrage of opprobrious racial comments," Bolden v. PRC Inc., 43 F.3d 545, 551 (10th Cir.1994); see Ways v. City of Lincoln, 871 F.2d 750, 754 (8th Cir.1989). Thus, whether racial slurs constitute a hostile work environment typically depends upon "the quantity, frequency, and severity" of those slurs, Vore v. Indiana Bell Tel. Co., 32 F.3d 1161, 1164 (7th Cir.1994), considered "cumulatively in order to obtain a realistic view of the work environment," Doe, 42 F.3d at 444; see Harris, 510 U.S. at 23.

Schwapp, 118 F.3d at 110-11. Here, the Court cannot yet determine whether the work environment at the company cannot be considered hostile, either subjectively or objectively, when the occurrence of several incidents is disputed by the parties. The Court recognizes that the plaintiff did not report certain of the incidents, and thus the defendant may not have been aware of them. "However, the fact that the incidents were or were not reported is irrelevant to a determination of whether or not a hostile environment existed." Distasio v. Perkin Elmer Corp., 157 F.3d 55, 62 (2d Cir. 1998) (considering the reporting of incidents in the context of a sexual harassment case). In this case, the plaintiff testified in his deposition–and Brunalli admitted in his own deposition–that Brunalli told the plaintiff in September 1989 in reference to his complaints about Henkel that he "didn't want to hear it anymore." As in Distasio, the jury could conclude that the plaintiff did not report the incidents because they did not occur, or because of his employer's admonition. See id. at 63.

As to the second prong of the hostile work environment test, an employer is presumed absolutely liable where harassment is perpetrated by the victim's supervisor, though employers may rely on an affirmative defense to rebut that resumption. See Burlington Indus. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Murray v. New York

College of Dentistry, 57 F.3d 243, 249 (2d Cir. 1995) ("[W]hen a supervisor wields the authority delegated to him by an employer . . . to further the creation of a discriminatorily abusive work environment, the supervisor's conduct is deemed to be that of the employer, and the employer's liability for that conduct is absolute."). As to complaints concerning a hostile work environment created by co-workers or low-level supervisors who do not wield their supervisory authority when carrying out the harassment, a plaintiff must also show that "the employer has either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it." Murray, 57 F.3d at 249. "Generally, the same standards apply to both race-based and sex-based hostile environment claims." Richardson v. New York State Dept. of Correctional Serv., 180 F.3d 426, 436 n.2 (2d Cir. 1999).

Here, genuine issues of material fact also exist as to whether a specific basis exists for imputing the conduct that created the hostile environment to the employer. First, several of allegedly harassing comments were made by the plaintiff's supervisors. For example, in March 1995, Miller is claimed to have stated that Nader was a prime suspect for things that went wrong because he is from the Middle East. The plaintiff testified that Brunalli himself is to have made certain degrading comments to the plaintiff on several occasions regarding the fact that Nader is Arabic, but as stated above, it is not clear when he made those comments or the frequency with which they were made. Second, as to the comments made by co-workers such as Henkel, there is an issue as to whether Brunalli's comment telling the plaintiff that he "didn't want to hear it anymore," as well as his own comments, indicate that the plaintiff had no reasonable avenue for complaint. Further, given that Nader at times reported the alleged harassment but that the harassment still persisted, a reasonable jury could find that the employer knew of the harassment

but did relatively little to stop it. Accordingly, summary judgment is inappropriate as to the plaintiff's hostile work environment claim.

3. Constructive discharge

Similarly, there are genuine issues of material fact as to whether the plaintiff has established a prima facie case under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) as to his constructive discharge claim under Title VII. In order to establish a prima facie case of discriminatory discharge under Title VII, a plaintiff must show that he: 1) is a member in a protected class, 2) was qualified for the position, 3) was terminated from the position and 4) was terminated under circumstances that raise an inference of discrimination. Windham v.. Time Warner, Inc., 275 F.3d 179, 187 (2d Cir. 2001). One of the elements of a discriminatory discharge case–namely, that the employee was discharged–is met by satisfying a showing of actual or constructive discharge. Chertkova v. Connecticut Gen. Life Ins. Co., 92 F.3d 81, 87 (2d Cir. 1996). Here, the plaintiff claims that he was constructively discharged from his position at the company, and in its motion for summary judgment, the company maintains that there is insufficient evidence of to support such a theory.

> Constructive discharge of an employee occurs when an employer, rather than directly discharging an individual, intentionally creates an intolerable work atmosphere that forces an employee to quit involuntarily. . . . Working conditions are intolerable if they are so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.

Id. at 88. Here, given that genuine issues of fact remain as to when and whether certain of the incidents occurred, the Court cannot now concluded that, as a matter of law, the plaintiff was constructively discharged. Consequently, summary judgment on this issue also is inappropriate.

B. Count Four: CFEPA

As to the plaintiff's claim under CFEPA, the defendant argues that it fails because Nader did not exhaust his administrative remedies by failing to obtain a release of jurisdiction from the CHRO.

"Any person claiming to be aggrieved by an alleged discriminatory practice" is allowed to file a complaint with the CHRO. Conn. Gen. Stat. § 46a-82(a). While the complaint is still pending, but 210 days after its filing, the complainant may request a release from the CHRO, unless the CHRO has scheduled the case for public hearing. Conn. Gen. Stat. § 46a-101; Matejek v. New England Technical Inst. of Conn., Inc., No. 404320, 1998 WL 182342, at *1 (Conn. Super. Apr. 7, 1998). The release entitles the complainant to bring a civil action in Connecticut Superior Court. § 46a-100.

If a complainant does not request a release while the case is pending, and the complaint is dismissed by the CHRO, he or she has two avenues of relief. First, "[i]f a complaint is dismissed pursuant to subsection (b) of section 46a-83 . . . and the complainant does not request reconsideration of such a dismissal as provided in subsection (e) of said section 46a-83 the executive director of the commission shall issue a release and the complainant may, within ninety days of receipt of the release from the commission, bring an action in accordance with section 46a-100 and sections 46a-102 to 46a-104, inclusive." Conn. Gen. Stat. § 46a-83a. Second, the complainant may take an administrative appeal of a final decision of the CHRO to the Connecticut Superior Court, Conn. Gen. Stat. § 46a-94a(a), though "a complainant may not appeal the dismissal of his complaint if he has been granted a release pursuant to section 46a-101," § 46a-94a(b). Third, the complainant may seek reconsideration of the dismissal pursuant to § 46a-83(e) and appeal any decision denying reconsideration in accordance with § 4-183. § 46a-94a(a). In

other words, "[i]n the event that the CCHRO rejects a request for reconsideration after dismissing a complaint. . . the complainant's only avenue of relief is to file an administrative appeal to the Connecticut Superior Court." Peltier v. Apple Health Care, Inc., 130 F. Supp. 2d 285, 293 (D. Conn. 2000) (citing Conn. Gen. Stat. § 46a-94a).

Here, the plaintiff did not request a release from the CHRO while his complaint was still pending or after his case was decided. The CHRO dismissed the plaintiff's complaint on May 12, 1998, and the plaintiff filed a timely request for reconsideration. The CHRO denied the plaintiff's request for reconsideration on September 17, 1998. See Def.'s Ex. I. As a result, his only avenue of relief is to have filed an administrative appeal to the Connecticut Superior Court. See Peltier, 130 F. Supp. 2d at 293. Thus, the defendant's motion for summary judgment is granted as to the CFEPA claim, as it appears that the Court lacks subject matter jurisdiction over this claim.[6]

C. Counts Two and Three: Intentional infliction of emotional distress

Finally, given the previously identified genuine issues of material fact that remain in the case as to the plaintiff's Title VII claims, the Court cannot grant defendant's motion for summary judgment as to the plaintiff's claims of intentional infliction of emotional distress, as a number are also material to those claims.

V. Conclusion

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[6]The Court notes that in Williams v. Commission on Human Rights and Opportunities, 777 A.2d 645, 650 (Conn. 2001), the Connecticut Supreme Court recently determined that the 180-day period required by Conn. Gen. Stat. § 46a-82(e) for filing discrimination claims with the CHRO is not subject matter jurisdictional, but instead is subject to waiver and equitable tolling. Here, however, this specific provision is not implicated, as there is no claim by the defendant that the plaintiff's CHRO claim was untimely. Further, if the Williams decision could be applied to the statutes at issue in this case, the plaintiff has not submitted any supplemental memoranda advancing any arguments of waiver or equitable tolling.

For the foregoing reasons, the defendant's motion [Doc. # 24] is GRANTED IN PART, DENIED IN PART. It is granted only as Count Four, the plaintiff's CFEPA claim. Therefore, Counts One, Two and Three remain in the case.

SO ORDERED this ___ day of March 2002, at Hartford, Connecticut.

Christopher F. Droney
United States District Judge